IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.36 OF 1997

Amit Anand Nare)
residing at Shri Ganesh Kripa,)
Near Government Colony, Alibag,)
District Raigad, Alibag) .....Petitioner.

V/s

The State of Maharashtra) ....Respondent.

Mr. Ranjit Bhosale h/f Mrs. V.R. Bhosale for the petitioner.

Ms. S.V. Gajare, APP for the State.

CORAM: V.M. KANADE, J.
DATE : 8th September, 2006.

ORAL JUDGMENT:

1. Petitioner is challenging the Order passed by the 2nd Additional Sessions Judge, Raigad, Alibag whereby he allowed the application which was filed by the co-accused and issued summons to the petitioner under section 319 of the Criminal Procedure Code for his appearance as co-accused in the criminal case which was pending before him.

2. Brief facts which are relevant for the purpose of deciding the present Criminal Revision Application are as

under:-

3. The FIR was lodged on 16/09/1995 by one Ravindra Nair. In the said complaint, it was alleged that on 16/09/1995, the petitioner and two others came there and, at that time, one Anil Pawar questioned the petitioner as to which of the students was teasing the college girls. The prosecution case is that after this question was asked, two accused assaulted Anil Pawar and, as a result of the injury which was sustained in the said assault, the said Anil Pawar died. Charge-sheet was filed against two persons who assaulted the deceased. When the case was committed to the Court of Sessions, an application was filed by the co-accused stating therein that the present petitioner was also equally responsible since he was a co-conspirator and, therefore, he should have been made as a co-accused in the said case. The Additional Sessions Judge, after perusing the statements of witnesses which were recorded by the police, felt that prima facie case was made out against the petitioner and, therefore, issued summons under section 319 of the Criminal Procedure Code.

4. The learned Counsel appearing on behalf of the petitioner submitted that the Sessions Judge did not have an authority and jurisdiction to issue summons under section 319 of the Criminal Procedure Code on the basis of the statements of witnesses which were recorded by the police and, therefore, on this very ground alone, the impugned order was liable to be set aside. In support of the said submission, he relied upon the judgment of the Supreme Court in the case of Ranjit Singh Vs. State of Punjab reported in (1998) 7 SCC 149. He also relied upon the judgment of the learned Single Judge of this Court in the case of Nilkanth s/o Krishna Thakre Vs. State of Maharashtra, reported in 2005(2) Mh.L.J. 103.

5. The learned APP appearing on behalf of the State, on the other hand, vehemently opposed the said submission. She submitted that it was open for the petitioner to appear before the Court and apply for discharge and there was no reason to interfere with the impugned order which was passed by the Sessions Court.

6. Before I consider the rival submissions which are made by the Counsel of either sides, it would be useful to refer to the provision of section 319 of the Criminal Procedure Code which reads as under:-

> "**319. Power to proceed against other persons appearing to be guilty of offence-** (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such court for the purpose of the inquiry into,

> or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub-section (1) then -
>
> (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.
>
> (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

The aforesaid provision clearly discloses that the trial court has jurisdiction to issue summons to any person if it feels that there is sufficient evidence on record against him.

However, what is to be noted is that the provision indicates that this exercise can be done only after the evidence is adduced by the prosecution. Though it is true that it is not necessary for the Sessions Court to wait till the entire evidence is led and, even after part of the evidence is led, if the trial court comes to the conclusion that the evidence which is on record is sufficient for the purpose of issuing process, the Court is entitled to do so.

7. The Supreme Court in the case of Ranjit Singh (supra), while considering the provision of section 319 read with section 209, has held that this power under section 319 cannot be invoked prior to the recording of evidence. The Supreme Court, however, has also observed that the Sessions Court is not powerless if it finds that there is sufficient material on record to issue summons against any other accused. However, the procedure for issuing summons in such a case has been indicated in the said judgment. The Supreme Court has observed that the Sessions Court can make reference to the High Court and the High Court, in that case, may give further directions in

that behalf. The Supreme Court in paras 20 and 23 of the said judgment observed as under:-

> "20. Thus, once the Sessions court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

> "23. Though such situations may arise only in extremely rare cases, the Sessions Court is not altogether powerless to deal with such situations to prevent a miscarriage of justice. It is then open to the Sessions Court to send a report to the High Court

> detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left-out accused. But we hasten to add that the said procedure need be resorted to only for rectifying or correcting such grave mistakes."

8. Similarly, in the case of Nilkanth s/o Krishna Thakre (supra), the learned Single Judge set aside the order which was passed by the trial court on the basis of two different types of statements of eye witnesses on an application which was moved by the APP. The learned Single Judge observed that the procedure which was followed by the trial court was against the provisions of section 319(1) of the Cr.P.C.

9. It would also be relevant to take into consideration another judgment of the Supreme Court in the case of Raj Kishore Prasad Vs. State of Bihar and anr., reported in 1996 (2) Crimes 142. The Surpeme Court in the said judgment has observed as under:-

> "Addition of an accused by summoning or re-summoning a discharged accused has only been permitted in the manner provided by section 319, Criminal Procedure Code on evidence adduced during trial and in no other way."

10. Similarly, in the case of Kishun Singh and others Vs. State of Bihar, reported in 1993(2) SCC 16, the Supreme Court has observed as under:-

> "On plain reading of sub-section (1) of section 319, there could be no doubt, that it must appear from the evidence tendered in the course of any inquiry or trial, that any person not being the accused, has committed any offence, for which he could be tried together with the accused, and that the said power could be exercised only if it so appears from the evidence adduced at the trial and not otherwise.....
> Section 319 of the Code cannot be

invoked
in a case where no evidence had been led at a trial."

From the plain reading of the provision of section 319 and the ratio of the judgments in the aforesaid cases, it is well established that a person can be added as an accused only as per the procedure which is prescribed under section 319 of the Cr. P.C. In the present case, Sessions Court had issued summons to the petitioner only after going through the statements of witnesses which were recorded by the police and before the evidence was led in the trial. The impugned order is patently illegal and, therefore, will have to be set aside.

11. Accordingly the following order is passed:-

O R D E R

Criminal Revision Application is allowed. Rule is made absolute in terms of prayer clause (a).

Criminal Revision Application is disposed of in the above terms.

Parties to act on the copy of this order duly authenticated by the Registry.

(V.M. KANADE, J.)